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IN THE

Supreme Court of the United States

October Term, 1962.

No. 713

EUGENE JAMES ALLEGRUCCI,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

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OCTOBER TERM, 1962.

No.

EUGENE JAMES ALLEGRUCCI,

Petitioner,

v,

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of the United States District Court for the Middle District of Pennsylvania which had adjudged petitioner guilty of violating 18 U. S. C. § 659.

OPINIONS BELOW.

The unreported Opinion and the judgment of the United States Court of Appeals for the Third Circuit appear at pp. 1a-3a, *infra*. It is a two-page Per Curiam Opinion. It points out that the questions raised by the appeal were considered and decided on an earlier appeal. *United States v. Allegrucci*, 299 F. 2d 811. On that earlier appeal, the Court of Appeals decided adversely to petitioner the question covered by this Petition, and every other question he raised, with the single exception that the Court of Appeals vacated the judgment [1] and remanded because peti-

1. Leaving no judgment to support a petition to this Court for certiorari at that time.

tioner had not been afforded the opportunity to speak on his own behalf before he was sentenced. After that, petitioner was resentenced. Petitioner then took the appeal which resulted in the unreported two-page Per Curiam Opinion. That Opinion correctly states that the law of the case had been established in the earlier Opinion (299 F. 2d 811). The United States District Court for the Middle District of Pennsylvania did not hand down an Opinion in connection with the appeal which was affirmed by the two-page Per Curiam Opinion. However, the District Court did publish an unreported memorandum Opinion in connection with the appeal which was decided at 299 F. 2d 811. This Opinion commences at 159a of the record in the Court of Appeals, which has been certified for the Supreme Court of the United States.

Petitioner has been tried twice on the indictment in question. His conviction at the first trial was reversed by the Court of Appeals (258 F. 2d 70) on grounds not involved in this petition. In connection with the case which was reported at 258 F. 2d 70, the District Court published an Opinion at 157 F. Supp. 142.

JURISDICTION.

The judgment of the Court of Appeals was entered on November 20, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and Rule 22(2).

QUESTION PRESENTED.

Does the doctrine of harmless error justify affirming this conviction where the trial judge denied petitioner's request that he be permitted to see a written statement made by a witness and that statement admittedly met the qualifications of the Jencks Act, subsection (e)(1), and the contents of the statement were not made known to petitioner?

CONSTITUTIONAL, STATUTORY, AND PROCEDURAL RULES PROVISIONS INVOLVED.

1. 18 United States Code § 659:

"Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen. . . . Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

2. Jencks Act, 18 U. S. C. 3500:

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which

relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of

the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

STATEMENT OF THE CASE.

1. The Nature of the Proceedings.

Petitioner appealed from a judgment of the United States District Court for the Middle District of Pennsylvania sentencing him to two eighteen-month concurrent terms of imprisonment.

The United States Court of Appeals for the Third Circuit affirmed this judgment.

2. Claims Upon Which Proceedings Were Based.

The indictment charged that on or about March 15, 1955, petitioner had in his possession, knowing the same to have been stolen, one movie projector and two cameras, which had been placed in interstate commerce and then stolen (4a, 5a).

REASONS FOR GRANTING THE WRIT.

Stated in its simplest terms, the charge was that petitioner had possession of goods knowing they had been stolen. The goods were a motion picture projector and two cameras. All three items had eventually turned up in the hands of a man named Hannis. The presence of the three items in the hands of one man certainly causes suspicion, since the evidence showed that before being stolen the goods had been left at different Railway Express platforms. Hannis exculpated himself by saying that he had received all the items from a man named Gull. Gull extricated himself by saying he had received them from petitioner. Nothing else connected petitioner with the stolen goods. He alone gave no explanation. He alone was arrested.

Petitioner did not testify. However, petitioner had been interviewed by Agent Roberts of the Federal Bureau of Investigation. In this interview, petitioner denied Gull's statement that Gull obtained the projector and the cameras from petitioner. This made the case a delicately balanced one of plea against oath, Gull's word against petitioner's word. Surely, evidence about the interview of petitioner conducted by Agent Roberts was of pivotal importance. This in turn means that the credibility of Agent Roberts was of pivotal importance. However, after Agent Roberts had testified on direct examination about the interview (100a, 101a), and after he had testified that he had made a memorandum of the interview, and after defense counsel had asked for the memorandum (102a, 107a), the trial judge refused to permit defense counsel to examine the memorandum (109a). The Assistant United States Attorney had argued with success that the statement was not "covered by the statute or the Jencks opinion" (103a, see 108a). In his Memorandum Opinion filed after the verdict, the trial judge concedes that the Jencks Act required that defense counsel be allowed to examine the memorandum. But the

trial judge (163a), like the Court of Appeals (299 F. 2d 811, 814), found that the error had been harmless error and not reversible error. It is this application of the harmless error doctrine that we attack. We shall now demonstrate that there has been misunderstanding in and conflict between the Circuits in their attempts to apply the Jencks Act as construed by this Court.

In *Jencks v. United States*, 353 U. S. 657, 668, 669, 77 S. Ct. 1007, 1013, this Court said that only the defense is adequately equipped to determine the effective use of a prior statement for the purpose of discrediting a government witness. This Court pointed out at page 667 of the *Jencks* opinion that:

> "Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."

However, the Court of Appeals in petitioner's case applied the doctrine of harmless error because it found that (299 F. 2d 811, 814):

> "In this case, the contents of the report prepared by Agent Roberts as to his interview with the defendant are nearly identical with Roberts' testimony on direct examination as to the substance of the interview.[2] A comparison of the memorandum with Roberts' testimony is set forth in Appendix III. In these circumstances we cannot see how the failure to order production of the report was anything but harmless error."

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2. The witness had not been asked for "the substance of the interview". He had been asked to relate the conversation (100a).

In doing what it did, the Court of Appeals really followed the concurring Opinion of Mr. Justice Burton (joined by Mr. Justice Harlan) in the *Jencks* case (see 353 U. S. at 678, 77 S. Ct. at 1018), instead of the Opinion of this Court. The Court of Appeals apparently lost sight of the following statement which appears in the Opinion of this Court in *Scales v. United States*, 367 U. S. 203, 258, 81A S. Ct. 1469, 1501:

> "Whether the statements so relate to prosecution testimony is a decision which is vested not in the Government but in the trial judge with full opportunity for appellate review. Once this question has been determined, whether the statements may be useful for purposes of impeachment is a decision which rests, of course, with the defendant himself."

While in *Palermo v. United States*, 360 U. S. 343, 346, 79 S. Ct. 1217, 1221, this Court said with regard to Jencks:

> "We also held that the trial judge was not to examine the statements to determine if they contained material inconsistent with the testimony of the witness before deciding whether he would turn them over to the defense. Once the statements had been shown to contain related material only the defense was adequately equipped to decide whether they had value for impeachment."

This Court had not reached the harmless error point in *Clancy v. United States*, 365 U. S. 312, 316, 81 S. Ct. 645, 648. In two other cases this Court found harmless error where the contents of the improperly withheld statement of the witness had been received by defense counsel from a source independent of the statement, and therefore defense counsel had the contents of the statement without having to examine the statement. See *Killian v. United States*, — U. S. —, 82 S. Ct. 302, 309; *Rosenberg v. United States*, 360 U. S. 367, 371, 79 S. Ct. 1231, 1234. But, petitioner's case is not the same as the cases of *Killian* and

Rosenberg. Petitioner never learned until after the trial was over what was in the prior statement of Agent Roberts.

Placing what this Court said in *Jencks*, in *Palermo*, and in *Scales* side by side with what this Court said in *Killian* and *Rosenberg*, we conclude it is the law of the United States that the harmless error doctrine does not apply to a case like ours in which a statement was improperly withheld and the defense did not learn the contents of the statement from another source, but the harmless error doctrine may be applied where the defense does learn from another source the contents of an improperly withheld statement. The Opinion of the Court of Appeals for the Third Circuit for the present case conflicts with this interpretation of the law.[3]

The Court of Appeals for the Second Circuit apparently is of the same view as that of the Third Circuit. *United States v. Annunziato*, 293 F. 2d 373, 381, cert. den.,[4] 368 U. S. 919, 82 S. Ct. 240.

On the other hand, the Court of Appeals for the Seventh Circuit has found that the harmless error doctrine does not apply in the circumstances of our case. See the next to the last paragraph of the Opinion in *United States v. Sheer*, 278 F. 2d 65, 68.

And the Sixth Circuit also holds that the harmless error doctrine does not apply. *Bergman v. United States*, 253 F. 2d 933, 936.

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3. The present case is not like *Campbell v. United States*, 365 U. S. 85, 99, 81 S. Ct. 421, 428 and *Palermo v. United States*, 360 U. S. 343, 355, 356, 79 S. Ct. 1217, 1226 in which the question was whether there had been a prior statement within the meaning of the Jencks Act. Here it is conceded that such a statement was withheld (163a, 299 F. 2d 811, 814). Nor is the present case similar to *Karp v. United States*, 277 F. 2d 843, 850, cert. den. 364 U. S. 842, 81 S. Ct. 80, in which the Court of Appeals for the Eighth Circuit held that there had been no prejudice in withholding a prior statement of the witness where the testimony of the defendant had differed in no material respect from the testimony of that witness.

4. It was not clear that the paper withheld in *Annunziato* was a "statement" within the meaning of the Act. Here it is conceded to be so.

We think we have demonstrated (a) that the Opinions of this Court are inconsistent with applying the harmless error doctrine to our case, (b) that the Second and Third Circuits are in conflict with the Sixth and Seventh Circuits on this point. Quite apart from that we shall now seek to show that in the present case it is clear that the withheld statement might well have helped the cross-examiner.

In *Jencks*, this Court said that flat contradiction between the testimony of the witness and the version of events given in his report is not the only test of inconsistency. This Court indicated that the omission from the reports of facts related at the trial, or a contrast in emphasis, or a different order of treatment were also important. *Jencks v. United States*, 353 U. S. 657, 667, 77 S. Ct. 1007, 1013. We take it that the omission from testimony of facts stated in the report might also be significant provided that testimony as to such facts would have been responsive to the questions asked in Court. Since the witness swears to tell the whole truth, the failure to state some of the truth in response to a pertinent question would certainly affect credibility. The important thing always to remember is that the prior statement need not have substantive value to the defense. Its use is to impeach.

We propose to analyze the present case with the above factors in mind.

Conveniently, the testimony of Agent Roberts and his prior report have been printed side by side as Appendix III to the Opinion of the Court of Appeals. 299 F. 2d 811, 819, 820. Examining it, we find that Agent Roberts was asked at the trial to relate his conversation with petitioner. This question called for all the conversation; not just the material substance of it. When Agent Roberts answered this question from the witness stand, he omitted from his testimony thirteen items that had been in his prior report of that conversation. Furthermore, he changed the emphasis of four items and changed the order in which he mentioned one item. The omissions are as follows:

1. Agent Roberts omitted from his testimony the fact that petitioner had told him that petitioner operated the Scranton Equipment Company, 639 Pear Street.

2. He omitted the fact that petitioner had told him that he was a *whole*saler.

3. He omitted the fact that petitioner had told him he dealt in household appliances.

4. He omitted the fact that petitioner had told him he also sold Benrus Wristwatches.

5. He omitted the fact that petitioner had told him that all he had *on hand* were paint and brushes.

6. He omitted the fact that petitioner had told him that he obtains merchandise in New York City by *going there*.

7. He omitted the fact that petitioner had told him that the distressed merchandise which he sometimes bought or sold was bought *in New York*.

8. He omitted the fact that petitioner had told him that he gets his *paint, brushes* and *appliances* from firms in Scranton.

9. He omitted the fact that petitioner had told him that those firms were *regular* wholesale supply firms.

10. He omitted the fact that petitioner was reluctant to discuss his business.

11. He omitted the fact that petitioner had told him that petitioner had *never* sold any cameras of any type. Indeed Agent Roberts changed this into testimony that petitioner had told him that petitioner had neither bought nor sold any cameras in over a year.

12. He omitted the fact that petitioner had denied any knowledge of Gull having sold any cameras.

13. He omitted the fact petitioner had said he was going to see his attorney after Roberts asked petitioner voluntarily to exhibit his merchandise on hand. This is of particular importance. By omitting this part of the report, Agent Roberts kept from the jury the fact that petitioner gave such a reason for his otherwise apparently evasive action in *not* exhibiting his merchandise on hand to Agent Roberts. Surely this gravely affects Roberts' credibility.

The four changes in emphasis as between the testimony of Agent Roberts and his report are as follows:

1. According to the report, petitioner mentioned costume jewelry as a sort of afterthought, after having advised that all he had on hand at the moment were paint and brushes. In the testimony, Agent Roberts lumped the mention of costume jewelry together with paint and brushes.

2. In the report, Agent Roberts said petitioner had "refused" to voluntarily exhibit merchandise on hand. In his testimony, Agent Roberts merely said that petitioner had said "he did not wish to do so". We recognize that the testimony may have been more favorable than the report in this instance. But we think that makes no difference. The important thing is that the inconsistency between the report and the testimony could have been shown in order to affect credibility. These inconsistencies and omissions affect credibility because an Agent who remembered his report so poorly when he testified may also have remembered the conversation with petitioner poorly when he wrote the report and when he testified.

3. In the report Agent Roberts stated that, in refusing to exhibit the merchandise, petitioner stated he did not want his neighbors to get the idea he was in "any kind of trouble". In the testimony, Agent Roberts changed the relatively emphatic word "trouble" to the relatively less emphatic word "difficulty".

4. In the report Agent Roberts stated that petitioner had "terminated" the interview. In his testimony, Agent Roberts merely indicated sub silentio that the interview came to an end.

The change in order of treatment is as follows:

In his report Agent Roberts indicated that very near the beginning of the interview petitioner stated that he keeps his merchandise in a small garage behind his house. In his testimony, Agent Roberts put this statement very near the end of the interview.

Who can say that a resourceful cross-examiner could not have affected the credibility of Agent Roberts by exploiting some or all of the total of eighteen discrepancies which we have noticed between the testimony and the prior inconsistent statement? No one. Particularly no one who, like this Court, has had occasion to observe the resourcefulness and originality of petitioner's trial counsel, Mr. Kossman.

CONCLUSION.

For the above reasons we ask that this Court grant certiorari, terminate the conflict between Circuits, and reduce confusion in the application of the Jencks Act.

Respectfully submitted,

MICHAEL VON MOSCHZISKER,
Attorney for Petitioner.

WOLF, BLOCK, SCHORR
AND SOLIS-COHEN,
Of Counsel.

I certify that I have served by United States mail five copies each of the foregoing Petition upon Solicitor General of the United States, Department of Justice, Washington 5, D. C., and upon United States Attorney, Federal Building, Scranton, Pa.

MICHAEL VON MOSCHZISKER,
Attorney for Petitioner.

Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 14,075.

UNITED STATES OF AMERICA

v.

EUGENE JAMES ALLEGRUCCI.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

Argued October 29, 1962.

Before STALEY, HASTIE and SMITH, *Circuit Judges.*

OPINION OF THE COURT.

(Filed November 20, 1962)

PER CURIAM.

This is the second appeal from a judgment of conviction on two counts of an indictment which charged the appellant with violations of Section 659 of Title 18, U. S. C., to wit, the possession of goods stolen from interstate commerce, knowing the same to have been stolen. When the case was before this Court on the earlier appeal the questions here raised were considered and decided and the decisions thereon, with one exception, were adverse to the contentions of the appellant. *United States v. Allegrucci*, 299 F. 2d 811. However, the sentence was vacated and the case was remanded because the appellant had not been

afforded the opportunity to speak on his own behalf in mitigation of punishment. *Ibid.* The present appeal followed the resentence of the appellant. The law of the case having been established in the earlier opinion of the Court, the questions raised are no longer open for review.

The judgment of the court below will be affirmed.

NOTE: See also *United States v. Allegrucci*, 258 F. 2d 70.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 14,075.

UNITED STATES OF AMERICA

v.

EUGENE JAMES ALLEGRUCCI,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

Present: STALEY, HASTIE and SMITH, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel submitted on briefs.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

HARRIET G. HUMPHRYS,
Chief Deputy Clerk.

November 20, 1962.

Received and filed November 20, 1962.

IDA O. CRESKOFF,
Clerk.

Supplement to Petition for a Writ of Certiorari

Office-Supreme Court, U.S.
FILED
FEB 9 1963
JOHN F. DAVIS, CLERK

IN THE

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No. 713.

EUGENE JAMES ALLEGRUCCI,
Petitioner,

v.

UNITED STATES OF AMERICA.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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UNITED STATES OF AMERICA.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Supplemental Statement as to Jurisdiction.

On January 9, 1963, as shown by the certified copy of proceedings filed with this Supplement to our Petition, the Court of Appeals ordered that petitioner should have leave to file a Petition for rehearing out of time on or before January 16, 1963. The Petition for rehearing was filed on January 11, 1963. On February 4, 1963, the Court of Appeals denied the Petition for rehearing, without opinion. A copy of the Order denying the Petition for rehearing follows.

Respectfully submitted,

MICHAEL VON MOSCHZISKER,
Attorney for Petitioner.

WOLF, BLOCK, SCHORR
AND SOLIS-COHEN,
Of Counsel.

I certify that I have served by United States mail five copies each of the foregoing Supplement to Petition upon Solicitor General of the United States, Department of Justice, Washington 5, D. C., and upon United States Attorney, Federal Building, Scranton, Pa.

MICHAEL VON MOSCHZISKER,
Attorney for Petitioner.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 14075.

UNITED STATES OF AMERICA

v.

EUGENE JAMES ALLEGRUCCI,
Appellant.

ORDER SUR PETITION FOR REHEARING.

Present: STALEY, HASTIE and SMITH, *Circuit Judges.*

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By THE COURT

WILLIAM F. SMITH,
Circuit Judge.

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IDA O. CRESKOFF,
CLERK

Dated:

February 4, 1963.